BALES RANCH, INC., ET AL.

IBLA 99-5, etc. Decided February 2, 2000

Appeals from a Decision Record/Finding of No Significant Impact by the Assistant Field Manager, Resources, Miles City Field Office, Montana, Bureau of Land Management, approving construction of a motorized access trail. EA No. MT-020-78-7-56.

Affirmed.

1. Environmental Quality: Environmental Statements!!National Environmental Policy Act of 1969: Environmental Statements!!National Environmental Policy Act of 1969: Finding of No Significant Impact

   BLM properly decides to approve construction of a new trail providing motorized access to public lands for hunting and other recreational purposes, absent preparation of an EIS, where, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), it has taken a hard look at the environmental consequences of doing so, considering all relevant matters of environmental concern, including the effects of off-road vehicle use away from the trail, and made a convincing case that, given appropriate mitigation measures, no significant impact will result therefrom. Its decision not to prepare an EIS will be affirmed when no appellant demonstrates, with objective proof, that BLM failed to consider a substantial environmental problem of material significance to the proposed action, or otherwise failed to abide by the statute.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

   Section 102(2)(E) of NEPA, 42 U.S.C. § 4332 (2)(E) requires consideration of "appropriate alternatives" to a proposed action, as well as their environmental consequences. The alternatives to the

> proposed action should accomplish the intended purpose, be technically and economically feasible, and have a lesser or no impact. Consideration of alternatives ensures that the decisionmaker has before him and takes into proper account all possible approaches to a particular project.

APPEARANCES: John E. Bloomquist, Esq., Helena, Montana, for Bales Ranch, Inc.; Victor L. Phillippi, Donald R. McDowell, and Kyle Butts, Powder River County Board of County Commissioners, Broadus, Montana, for the Powder River County Board of County Commissioners; Marian W. Hanson, pro se; Clarence Bulkley, pro se and for the B.A.R. Corporation; Walter C. Richburg, Bank One, Texas, N.A., Fort Worth, Texas, for Bank One, Texas, N.A., Trustee under the Will of Arabel Rowe Dunbar; Jane Dunbar, pro se; Brian M. Morris, Esq., Bozeman, Montana, for Intervenors; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bales Ranch, Inc. (Bales Ranch), and others have appealed from an August 14, 1998, Decision Record (DR) and Finding of No Significant Impact (FONSI) of the Assistant Field Manager, Resources, Miles City Field Office, Montana, Bureau of Land Management (BLM), approving construction of the "Quietus Loop Alternate Access Route" in southeastern Montana. 1/ Finding substantial similarity in the legal and factual issues raised by the four appeals, we hereby grant BLM's motion to consolidate those appeals. 2/

1/ Appeals were filed by Bales Ranch (IBLA No. 99-5), Powder River County Board of County Commissioners (County Commissioners) (IBLA No. 99-6), Marian W. Hanson, a Montana State Representative (IBLA No. 99-7), and the B.A.R. Corporation (B.A.R.), Clarence Bulkley (President, B.A.R.), Bank One, Texas, N.A., acting through Walter C. Richburg (Trustee under the Will of Arabel Rowe Dunbar), and Jane Dunbar (hereinafter, collectively, B.A.R. et al.) (IBLA No. 99-18).

2/ A handwritten insert at the bottom of page 5 of the B.A.R. et al. statement of reasons for appeal (SOR) states that the "views, opinions, & concerns contained in this Statement of Reasons are solely those of Jane Dunbar and Bank One, Texas and do not necessarily represent those of B.A.R. Corporation, Clarence or Cheryl Bulkley. CB" We assume the initials are those of Clarence Bulkley. The SOR has three copies of the signatory page. The first was signed by Bulkley, for himself and as President of B.A.R. The second contains Jane Dunbar's signature, and the third is signed by Richburg, acting as Trustee under the Will of Arabel Rowe Dunbar. We are unable to discern what assertions in the SOR are disavowed by Bulkley, and we will consider the B.A.R. et al. SOR to have been filed on behalf of the appellants named in that SOR.

The Public Land Access Association, Inc., Skyline Sportsmen's Association, Inc., Anaconda Sportsmen's Association, Inc., Billings Rod & Gun Club, Laurel Rod & Gun Club, Custer Rod & Gun Club, Montana Wildlife Federation, Coalition for the Appropriate Management of State Lands, Inc., Southwestern Montana Sportsmen's Association, and Russell Country Sportsmen's Association (hereinafter, collectively, Intervenors) all have requested to intervene in the present proceeding, in support of BLM. These organizations assert that their members recreate on the public lands that would be accessed by the proposed new trail and that they promote public access to public lands for hunting and other recreational purposes. Intervenors would be adversely affected by a Board decision to reverse BLM's decision to authorize construction, and could have independently maintained an appeal. Therefore, they will be permitted to intervene as a matter of right. See Sierra Club ! Rocky Mountain Chapter, 75 IBLA 220, 221!22 n.2 (1983).

These appeals arise from the proposed construction of a two-track trail in four segments consisting of two newly constructed segments of trail across public land that would connect with two existing segments of trail, also on public land. When finished, the trail would permit motorized public access to a sizeable L-shaped block of public and State lands straddling the Montana/Wyoming border which is entirely surrounded by private lands (L-shaped block). The entire access route is approximately 4 miles long (including the proposed segments which are about 1.75 miles long). The trail would begin in sec. 12, T. 9 S., R. 45 E., and run in a southerly direction to sec. 31, T. 9 S., R. 46 E., Principal Meridian, Powder River County, Montana. The proposed route is through a three- quarters to one and one-half miles wide band of public lands making up the north-south leg of the L-shaped block. 3/ The end of the trail would provide access to the majority of the land in the east-west leg of the L-shaped block (approximately 11,820 acres), and open that leg to the public for hunting and other recreational activities.

The access route has been proposed as a replacement for the "Quietus Loop Road," a road formerly owned and maintained by Powder River County (Montana). The Quietus Loop Road had provided the "sole" motorized access to most of the L-shaped block. 4/ (BLM Response to Stay Request at 2; see EA at 1, 8; BLM Answer at 3 n.1; Intervenors' Answer at 2-3.)

3/ The proposed trail crosses public lands in secs. 12, 24, and 25, T. 9 S., R. 45 E., and secs. 7, 18, 19, 30, T. 9 S., R. 46 E., Principal Meridian, Powder River County, Montana.

4/ Legal access to the L-shaped block still exists from the north. However, those using this access must "hike about five miles to get to Section 31." (Environmental Assessment (EA) at 1.) Apparently the inability to travel by motor vehicle is because the north-south leg of the L-shaped block is crossed by ungated fences. The proposed construction would include gates at fence crossings.

The County maintained road was closed when the right-of-way for the road was formally abandoned by Powder River County on February 7, 1995, in response to a petition filed by Bales Ranch. (Ex. E attached to Bales Ranch SOR; Intervenors' Answer at 2-3.)

BLM prepared an EA to assess the environmental impacts of the proposed action and of a no action alternative (No. MT-020-78-7-56). This EA was made available for a 30-day public comment period on April 28, 1998.

In his August 1998 DR, the Assistant Field Manager addressed the public comments and adopted BLM's proposed action, approving construction of the proposed motorized access route. He stated that the trail construction was designed by BLM to minimize surface disturbances and the attendant costs of construction. He explained that

> [t]he primary method of construction will be to drive vehicles and other equipment along a predetermined route to crush vegetation and establish visible tracks. At one location on the existing trail * * *, the trail will be reshaped so it is perpendicular to the slope. This will require cutting back a short section of the hillside and regrading approximately 50-100 feet of the existing trail. The associated surface disturbance will be reseeded with native species. There are a few locations along the new trail segments where removal of sagebrush * * * will be necessary. To minimize surface disturbance, the soil surface will not be bladed or scalped to remove the sagebrush. Instead, sagebrush will be removed using the bucket of a front-end loader, keeping the bucket elevated above the soil surface. The concept is to use the teeth of the bucket to break-off the sagebrush rather than uproot it to minimize soil disturbance.

(DR at 2; see EA at 4, 6.) The proposed plan also provided for minimizing damage to the three drainages the trail would cross. At the crossing for the drainage with flowing water "except under the driest of conditions," the proposed trail crossing was designed

> [t]o prevent vehicle damage to moist or wet soils, [by laying] concrete slabs * * * across * * * the stream channel[]. Approaches from both sides of the channel[] will be armored with rock far enough from the channel to prevent rutting wet or moist soils. Fabric will underlay the concrete slabs and rock armoring.

(DR at 2; see EA at 6.)

The Assistant Field Manager found that the potential negative environmental impacts disclosed in the EA were "outweigh[ed]" by the advantages of providing motorized access, thus benefitting a "broader group of public land users." (DR at 3.) He also determined that no significant environmental impact upon the human environment was likely to

result from the proposed action, relieving BLM of the requirement under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), to prepare an environmental impact statement (EIS). He found that approval of the proposed action conformed both to the applicable BLM land-use plan (1985 Powder River Resource Management Plan (RMP)), which provided for obtaining "[a]ccess to more public land for future recreation," and the April 1989 "State Director Guidance" issued by the BLM Montana State Director, and directing BLM field offices to "provide access to * * * tracts of public lands having significant recreation values." (DR at 1.) Bales Ranch and the other appellants all took timely appeals from the Assistant Field Manager's August 1998 DR and FONSI.

[1] Section 102(2)(C) of NEPA, as amended, 42 U.S.C. § 4332(2)(C) (1994), and its implementing regulations, 40 C.F.R. Part V, require the preparation of an EIS if a Federal agency like BLM intends to engage in a "major Federal action[] significantly affecting the quality of the human environment." See Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). As a beginning step, an EA is prepared to determine whether an EIS is required. 40 C.F.R. § 1501.4. When an agency makes a finding of no significant environmental impact based upon its EA, and issues a decision to proceed with a proposed action without preparing an EIS, that decision will be held to comply with section 102(2)(C) of NEPA if the record demonstrates that the agency has considered relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a case that no significant impact will result if the proposed action is taken, or that any of the potentially significant environmental impacts will be rendered insignificant by the adoption of appropriate mitigation measures. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Nez Perce Tribal Executive Committee, 120 IBLA 34, 37!38 (1991).

When an appeal is taken from a FONSI decision, the appellant must demonstrate, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance, or otherwise failed to meet the requirements set out in section 102(2)(C) of NEPA. Southern Utah Wilderness Alliance, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); Red Thunder, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); Sierra Club, 92 IBLA 290, 303 (1986).

When BLM has complied with the procedural requirements of section 102(2)(C) of NEPA, by actually taking a hard look at the environmental impacts of a proposed action, it will have complied with NEPA, even though this Board or a court (in the event of judicial review) might deem it appropriate take a different course with respect to the proposed action. See Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227!28 (1980); Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972); Great Basin Mine Watch, 148 IBLA 1, 3 (1999). As we said in Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1990):

> [Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and,

> specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

When considering whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, this Board will be guided by the "rule of reason," as expressed in Don't Ruin Our Park v. Stone, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992):

> An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information." Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1526 (D. Hawaii 1991) * * *. So long as an EA contains a "'reasonably thorough discussion of . . . significant aspects of the probable environmental consequences,'" NEPA requirements have been satisfied. Sierra Club v. United States Department of Transportation, 664 F. Supp. 1324, 1338 (N.D. Ca. 1987) * * * quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). [Footnote deleted.]

See 40 C.F.R. § 1508.9; Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Missouri Coalition for the Environment, 124 IBLA 211, 219-20 (1992).

BLM seeks dismissal of the appeals filed by the County Commissioners and Hanson, arguing that they lack standing to appeal because they failed to show how the decision had an adverse affect on them, as required by 43 C.F.R. § 4.410(a). (Answer at 2.) We find nothing in the record or their statements on appeal showing how the decision adversely affected them, or that it is likely that they will suffer if the proposed new trail is built. See Becharof Corp., 147 IBLA 117, 129 (1998). We would normally direct the County Commissioners and Hanson to show cause why their appeals should not be dismissed for lack of standing. However, as the other appellants clearly have standing and have advanced the majority of the arguments on appeal, it is not necessary to address BLM's request.

Bales Ranch owns private lands near the proposed trail and grazes livestock on public lands in its vicinity. The principal contention in Bales Ranch's SOR is that BLM violated section 102(2)(C) of NEPA by failing to adequately consider the potential environmental impact of constructing the proposed trail across public lands, and reasonable

alternatives thereto. 5/ A number of allegations are made in support of this contention.

According to Bales Ranch, BLM failed to adequately consider and/or mitigate the potential adverse impacts of construction of the new access trail on fragile, highly erodible soils along, adjacent to, and near the proposed route. (SOR at 7-9; Reply at 3-4.) It asserts that BLM did not provide appropriate measures to eliminate or minimize the acknowledged adverse impact of erosion of the soils along the route resulting from vehicular travel. (SOR at 8.) It also asserts that there will be unrestricted use of the trail, and BLM did not consider the potential adverse impact upon adjacent and nearby soils, resulting from off-road vehicles (ORV's) going off of the designated route, creating "multiple vehicle routes criss-crossing the area." Id. It contends that BLM is required to consider these impacts because they are a "reasonably foreseeable consequence" of the proposed action. Id. (citing 40 C.F.R. § 1508.8(b)).

BLM was aware that soils along and in the vicinity of the proposed trail route are susceptible to erosion and that vehicular traffic could potentially cause soil erosion both along the trail and away from it. (EA at 4, 8-9, 11-12.) This possibility was presented to BLM during the environmental review process and on appeal. See SOR at 9 ("proposed route intermittently crosses highly erodible soils [and] * * * areas adjacent to the proposed route * * * include[] many areas with sever[e]ly erodible soils," citing Ex. D attached to SOR (County's "soil survey map")); Letter to BLM from Bales Ranch, dated Feb. 26, 1998, at 2. In turn, BLM considered these impacts and took mitigating measures designed to minimize them both during the construction phase and subsequent ORV use. The Assistant Field Manager found the risk to be acceptable, even during wet conditions, basing his finding on the following statement in the EA: "The area is not a major destination point for most visitors. Many of the current users are concerned with maintaining the integrity of resources on public lands and avoid driving roads when soils are too wet." (EA at 11.) The proposed action included posting a sign at the main access point to the trail, discouraging vehicle travel "under wet conditions." (DR at 2; see EA at 11-12.) In addition, the Assistant Field Manager provided for inspection of the route and "appropriate action" to correct "[a]ny erosion problems" detected. 6/ (DR at 3.) He concluded that he did not

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5/ Hanson filed no SOR on her own behalf, but joins in the SOR filed by Bales Ranch. (Letter to Board, dated Oct. 19, 1998.)

6/ Bales Ranch also asserts that providing for construction and use of a trail across fragile, highly erodible soils violates the mandate in the State Director Guidance, which states: "Soils [o]n an access area will be examined for stability and suitability for constructi[ng] roads or trails. Fragile soils easily damaged or highly erod[a]ble will be protected or avoided by erosion protection measures or alternate routes." (SOR at 9 (quoting from State Director Guidance (Ex. A attached to SOR) at "13").) BLM included design features and construction techniques intended to provide erosion protection measures along the proposed trail. (DR at 2-3.) Taking into consideration the absence of a reasonable alternate route, the action appears to comply with the State Director Guidance.

anticipate any significant impact to the environment, including soils. (DR at 3; FONSI.)

Turning to the potential for soil erosion caused by ORV use away from the trail, we agree that construction of the proposed trail will facilitate ORV access across the public lands. However, neither Bales Ranch nor the County Commissioners offers evidence that the anticipated use will result in a measurable amount of off-trail activity likely to cause soil erosion or other material detrimental impacts. Without this evidence we are unable to find error. The evidence before us supports a finding that the potential for soil erosion caused by ORV use away from the trail is, at best, remote and speculative. It need not be considered. See Coeur d'Alene Audubon Society, Inc., 146 IBLA 65, 70 (1998) (citing Trout Unlimited v. Morton, 509 F.2d at 1283).

Absent a showing that there is likely to be a significant impact as a result of adoption of the proposed action, BLM was not required to further mitigate any potential adverse impact to soils, either along or away from the trail, in order to properly render a FONSI. Powder River Basin Resource Council, 144 IBLA 319, 321, 328 (1998).

Bales Ranch argues that BLM failed to adequately consider and mitigate the potential impact of trespass by ORV's onto private lands where the public/private land boundaries are unmarked, and it is easy to inadvertently stray on to private land. (SOR at 9-11; Reply at 3-5.) BLM was obviously aware of the potential of having ORV's stray upon private lands, which are in fairly close proximity at several places along the route. "[P]ublic-private land boundaries * * * are not easily recognizable on the ground. There are 11.5 miles of [public/private land] boundary with only 2.5 miles being fenced and some fences are not on boundaries." (EA at 1.) "[O]wnership boundaries do not follow terrain features." (EA at 4, see also EA at 13, 24, 28, "Map 1".) Recognizing this difficulty, BLM concluded that it was likely that there would be few occurrences of trespass. It based its determination on its plans to install signs along the route to help users stay on the trail, and ultimately because State law prescribes a penalty for trespass. See EA at 6, 13; DR at 2. We note that the file contains a letter to Bales Ranch from Chris Anderson, Montana Game Warden. In his letter he makes the following observation: "I do not believe that the area would see a large increase in violations if the [proposed] trail is approved. The area in question has always been public land and it has not been a problem area, even when the now abandoned county road accessed the same area." (Letter postmarked Jan. 8, 1998, at 2.)

No evidence is offered by Bales Ranch that would indicate that BLM did not undertake a reasonably thorough examination of significant aspects of trespass upon private land that could reasonably be expected to result from the construction of the trail, or that the BLM determination that the environmental consequences would not be significant was incorrect.

Therefore it has failed to show that its analysis is deficient or that additional measures must be adopted to avoid a significant impact. 7/

Bales Ranch argues that BLM failed to adequately consider the potential impact of the proposed new trail on mule deer and other wildlife, and particularly the impact of making sec. 31 and public lands along and at the end of the route more accessible. It opines that the trail will cause a material increase in the level of hunting in the area. (SOR at 11–12; Reply at 3–4.) BLM recognized that the proposed action could increase the hunter use of the trail route and give greater access to sec. 31 and the public lands, especially when the predominant use was recreational hunting. (EA at 9–10, 12–14, 23, 27.) BLM declined to directly address the impact of hunting on wildlife in the EA. Id. at 27. However, in its answer on appeal BLM notes that the appellants seek to give the impression that the L-shaped block was "suddenly being opened to * * * hunting pressure." (Answer at 5.) It states that in actuality, hunting has been allowed in the area for a long period of time. BLM does not foresee any major or new impact on wildlife, and states that it "concluded, after consulting with the experts (Montana Department of Fish, Wildlife and Parks)[,] that new pressure on wildlife will be minimal and localized." (Answer at 5; see Intervenors' Answer at 5.)

We note that, prior to the closure of the Quietus Loop Road by the County, road access to the area was easier than it will be if the trail is completed, and there is no evidence that there was a material adverse impact on the wildlife resulting from that road, or that the level of the pressure will rise to the level it was when the Quietus Loop Road was open. Bales Ranch has failed to present any evidence that the proposed action is likely to lead to any material increase in the hunting pressure not considered by BLM.

Next, Bales Ranch argues that BLM failed to consider and adopt measures to mitigate the potential impact of the proposed new trail on native vegetation. It expresses concern that the use of the trail will encourage growth of noxious weeds which will then spread to adjacent land (public and private) adversely impacting its productivity. (SOR at 12, 13 and 17; Reply at 3-4.)

BLM considered whether the proposed action had the potential to lead to the spread of noxious weeds which would adversely impact livestock and wildlife vegetative use. It concluded that the potential was slight. It states that the method of construction selected is a mitigative measure because that method would cause minimal disturbance of the soil crust,

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7/ There is no evidence that a trespass which might occur as a consequence of construction of the proposed trail would rise to the level of a "burden" on private lands, thus violating the proscription in the State Director Guidance. (SOR at 10 (citing State Director Guidance (Ex. A attached to SOR) at "6").)

which invites weed establishment. (EA at 4, 9, 12; DR at 3; BLM Answer at 6.) However, BLM admitted that it was difficult to predict whether and to what extent ORV use would cause the spread of noxious weeds, because of the lack of a reliable link between vehicle use and noxious weed infestation, given the other means by which noxious weed seeds may be transported (air, water, livestock, wildlife, and people). (EA at 12.) Thus, it concluded that, even taking no action, will "likely" result in noxious weeds being "spread by other means." Id. at 14. Nonetheless, the proposed action includes a base inventory of weeds along the route, followed by periodic monitoring to assess the extent to which noxious weeds might be invading the area, and, if necessary, treatment to suppress the noxious weeds within the first growing season. (EA at 12; DR at 3.)

Given the discussion of the spread of noxious weeds along the proposed trail, we are not persuaded that it was necessary to address the even more speculative question of spread of noxious weeds away from the proposed trail resulting from the proposed action. Bales Ranch has provided no evidence that it could reasonably be expected that as a consequence of the proposed action (including the proposed mitigating measures) noxious weeds will invade areas away from the proposed trail route, crowding out native vegetation and threatening wildlife and livestock grazing.

The record supports a conclusion that, after considering all relevant matters of environmental concern, the Assistant Field Manager has taken a hard look at potential environmental impacts and made a convincing case that no significant impact will result. No EIS was required. See Nez Perce Tribal Executive Committee, 120 IBLA at 37!38. The appellants have failed to carry their burden of demonstrating, with objective proof, that BLM failed to abide by section 102(2)(C) of NEPA. The fact that they may have a differing opinion regarding environmental impacts or prefer another course of action does not demonstrate a violation of the procedural requirements of NEPA. 8/ San Juan Citizens Alliance, 129 IBLA 1, 14 (1994).

Bales Ranch further contends that BLM failed to adequately consider reasonable alternatives to the proposed action, in violation of section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1994). (SOR at 3–6, 10–11, 13; Reply at 2–3.) It refers specifically to two alternatives proposed by interested members of the public during the environmental review process. The first is constructing the proposed trail but permitting "horseback or foot travel only," and the second is obtaining alternative access to sec. 31 and the other public lands "via land exchanges, easement acquisitions or other appropriate mechanisms." 9/ (SOR at 4, 5.)

8/ At page 7 of BLM's Answer it alleges that Bales Ranch does not want the public having motorized access to an area that it uses for grazing and outfitting. In its Response to Stay Request, BLM states that Bales Ranch operates an outfitting business that abuts the large block of public land and without the Quietus Loop Road or the proposed trail Bales Ranch will have the closest and easiest access to a greater portion of that block. We need not address whether Bales Ranch or other appellants seek to preclude motorized access because they want to limit conflicting use.

9/ The County Commissioners raised a similar assertion by claiming that BLM should have considered obtaining access "through private land." (County Commissioners' SOR at 1.)

[2] Section 102(2)(E) of NEPA requires consideration of "appropriate alternatives" to a proposed action, as well as their environmental consequences. 42 U.S.C. § 4332(2)(E) (1994); see 40 C.F.R. §§ 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hastey, No. S92!1670!WBS!PAN (E.D. Cal. Oct. 4, 1993). The alternatives to the proposed action should accomplish the intended purpose, be technically and economically feasible, and have a lesser or no impact. 40 C.F.R. § 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d at 1466-67; Howard B. Keck, Jr., 124 IBLA at 53-54. This includes the no action alternative. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). Consideration of alternatives ensures that the decisionmaker "has before him and takes into proper account all possible approaches to a particular project." Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

When determining which alternatives to the proposed action it would study in further detail, BLM considered precluding vehicular traffic on the route, and limiting use of the proposed trail to foot or horseback travel. It concluded that, considering the nature of the terrain it crossed, when it became known that a foot or horse trail had been developed with gates in existing fences, and access could be gained to sec. 31 and the other public lands, vehicular use of the trail and immediately adjacent public land would inevitably occur. According to BLM, it would be difficult to prevent ORV use, and "multiple roads" would result, with a loss of the benefits of designing the trail for foot or horse use. BLM expressed a preference for having "one clearly defined vehicle route." (EA at 5; Answer at 3.) Of more importance, the stated purpose of the proposed action was to provide motorized access to sec. 31, in accordance with BLM's 1985 Powder River RMP. (Answer at 3.) This purpose would not be achieved if the trail was limited to foot and horseback travel. In fact, BLM was not required to consider this alternative. See Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588, 591–94 (9th Cir. 1988); Wilderness Watch, 142 IBLA 302, 306 (1998). BLM deemed motorized access to be especially important because limiting travel to foot and horseback travel would severely limit overall public access:

> The horseback/foot travel option leaves the public more than 10 miles, across highly undulating terrain, from the main block of BLM land. Only the hardiest members of the public, or those with access to horses, would have any chance to access this 13,5[2]0[-]acre block [of public/State lands].

(Intervenors' Answer at 4; see EA at 14.)

Bales Ranch presents no evidence to contradict BLM's analysis. It has simply challenged BLM's assertion that limiting or precluding ORV use of public lands in the vicinity of the proposed new trail is beyond the scope of the EA. (EA at 4–5; BLM Answer at 3.) It argues that the

difficulty inherent in implementing a given alternative does not affect whether it is reasonable, and the restricted travel alternative must be considered by BLM. (SOR at 5 (citing 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981)).)

We agree with Bales Ranch that BLM may not avoid considering an alternative because it does not desire to undertake it. However, Bales Ranch misses the real reason for BLM's decision not to consider the foot/horseback travel only alternative in any further depth. It determined that this alternative would not accomplish the intended purpose of the proposed action, which is to provide motorized access to sec. 31 and the other public lands.

BLM also considered acquiring either fee ownership of or limited easement rights across private lands to provide access to sec. 31 and the other public lands. In its answer, BLM states that it had worked for a period of years to resolve this matter, and that it proposed the Alternate Access Route only after the exchange proposals were deemed to be contrary to law or policy. (Answer at 7.)

The exchanges proposed by Bales Ranch and B.A.R. would have afforded a means of establishing motorized access across their private lands to the east-west leg of public/State land in exchange for 3,240 acres of public land, including land designated by both the Montana and Wyoming BLM offices for retention. 10/ (EA at 5; BLM Answer at 3–4; Intervenors' Answer at 3; see Memorandum from Squires, dated Aug. 20, 1997; Memorandum from Squires, dated Sept. 12, 1997; "Easement Proposal" attached to Letter to BLM from Bales Ranch, dated Feb. 26, 1998; Letter to BLM from B.A.R., dated Dec. 16, 1997.) The proposed exchange would involve giving up a sizeable portion of the public lands to which access was sought. 11/ Therefore an exchange would go far beyond the purpose of the proposed action, and would, to a

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10/ Bales Ranch and B.A.R. did not offer to convey their private land in exchange for the 3,240 acres of public land. In a memorandum dated Aug. 20, 1997, Garth Squires, a BLM employee, stated that the Bales Ranch "interest seemed to be mainly in trading the easement for the strip of PD [public domain]." See also, "Easement Proposal," attached to Dec. 16, 1997, letter from Bales Ranch to BLM. In a Jan. 21, 1998, letter to Bales Ranch, BLM stated that "we are still open to further discussion on trading public and deeded lands of equal value that would result in public access to the block of public[/State] land on the Montana/Wyoming border." In its Feb. 26, 1998, response to BLM's offer to discuss a land exchange, Bales Ranch suggested that BLM receive unspecified "lands" from a "third party." There is no evidence that either Bales Ranch or B.A.R. proposed an exchange of specific private lands capable of fulfilling the purpose of the proposed action.

11/ Bales Ranch refused to allow BLM to purchase an easement, apart from the proposed exchange. (EA at 5.) Similarly, there is no indication that B.A.R. was amenable to the purchase of an easement. They had foreclosed this alternative, but do not identify another easement available to BLM which would have permitted motorized access to sec. 31.

large degree, defeat it. This fact alone is sufficient to render the proposal unreasonable. See Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d at 591-94; Wilderness Watch, 142 IBLA at 306. Bales Ranch has neither submitted proof to the contrary, nor offered any evidence that motorized access to the east-west leg might have been afforded by another land exchange or acquisition available to BLM. 12/

Appellants have not shown that the alternatives they suggest were, in fact, reasonable alternatives, which should have received the hard look required by section 102(2)(E) of NEPA. BLM's decision not to select those alternatives for detailed environmental analysis did not violate the requirement of 40 C.F.R. § 1508.9 that an EA include a "brief discussion[] * * * of alternatives." See City of Aurora v. Hunt, 749 F.2d at 1466-67; Wyoming Outdoor Council, 147 IBLA 105, 114 (1998).

Bales Ranch contends that BLM failed to cooperate with the County Commissioners, in violation of 43 C.F.R. § 8300.0-6 (1995). 13/ This regulation provides: "In cooperation with State and local government and private landholders, [BLM] shall endeavor to provide for public access to public lands with outdoor recreation values." 14/ (SOR at 15.) Bales Ranch states that: "Comments from the [Powder River] County Commissioners, alternatives for BLM's proposed access route at issue in this matter offered by the Commissioners, and concerns raised by the Commissioners in the development of alternatives, have gone unheeded by the Miles City BLM." Id.

When undertaking its environmental review and when deciding whether to go forward with the proposed action, BLM considered the comments and concerns expressed by the County Commissioners and the other parties who submitted comments. (EA at 14-15; DR at 3.) In addition, it contacted the local government and listened to their position. (Answer at 7.) BLM was not bound by 43 C.F.R. § 8300.0-6 (1995) to accede to the wishes of the local officials or to adopt a course of action proposed by them. It is clear that BLM is not obligated to capitulate to a local government. To do so would be an improper delegation of that authority delegated to the Secretary of the Interior. Nor can BLM's failure to accede to the wishes of the local officials or to adopt a course of action proposed by them be construed as a violation of the "cooperation" requirement of the regulation.

12/ State Director Guidance provides that BLM is to acquire public access "through land exchanges, direct purchase of land or land rights, rights-of-way, or easements or long-term land use agreements." (Ex. A attached to Bales Ranch SOR at "2".) However, it does not preclude BLM from developing access across public lands.

13/ Part 8300 of 43 C.F.R. was removed from BLM's regulatory program, effective July 12, 1996. 61 Fed. Reg. 29679 (June 12, 1996).

14/ Bales Ranch also notes that the State Director Guidance provides that, to achieve an equitable balance between the public's right to access public lands and affected private property rights, BLM access decisions "require close cooperation between landowners, land users, land or resource management agencies, and local governments." (SOR at 15 (quoting from State Director Guidance (Ex. A attached to SOR) at "11").)

B.A.R. et al., also own private lands near the proposed trail and graze livestock on public lands in its vicinity. They argue that BLM failed to consider the likelihood that the proposed action will lead to increased ORV use of the entire tract of public/State land served by the proposed trail, thus accelerating soil erosion over a much larger area. They continue by stating that this erosion will then threaten degradation of the quality of the water supply and riparian ecosystems on adjacent public and private lands downstream from the point of erosion. 15/ (SOR at 2–4.) B.A.R. et al. dispute BLM's claim that there will be little ORV traffic within much of the east-west leg of the L-shaped tract, due to the "ruggedness of the terrain": "[O]ne only has to visit similar rugged terrain on public land and note use by ATV's [all-terrain vehicles], motorcycles, and specially equipped 4X4 vehicles. * * * Once people drive their vehicles to Section 31, there is nothing to stop them from continuing to drive across the remainder of the [east-west leg of the L-shaped tract]." (SOR at 2 (quoting from EA at 8), 3.) They, thus, conclude: "[BLM provides] for mitigati[ng] * * * the erosiveness of the soil and crossing of riparian and low lying areas through the development of crossings and gradings, yet fails to address any such issues with regard to the [east-west leg of the L-shaped tract]." (SOR at 3.)

When undertaking its assessment BLM recognized that it was likely that reestablishing vehicle access into the area would result in higher visitation than previously experienced, particularly for hunting. (EA at 7.) However, it was also noted that the topography of the two legs of the L-shaped tract differed. "To the north there are low, rolling hills * * *. The southern area contains badlands-like topography." Id. "People will still have to walk at least 8 miles to access [the east-west leg] east of Section 31." (EA at 25.) In a December 16, 1997, letter to BLM, Clarence Bulkley, President of B.A.R., said that it was "next to impossible for vehicle access past Section 31 due to the terrain * * *." We are not persuaded by B.A.R. et al. that constructing the proposed new trail will lead to large-scale ORV use of the east-west leg of the L-shaped tract, thus resulting in soil erosion and the consequent degradation of downstream water quality and riparian ecosystems on adjacent public and private lands. B.A.R. et al. have presented no evidence that there is likely to be material ORV use in that overall area or, even assuming that there will be, that it is likely to rise to a level that threatens downstream water quality and riparian ecosystems. We find no basis for concluding that there

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15/ B.A.R. et al. also argue that BLM failed to consider the impacts upon visual resources, threatened and endangered species, wildlife, private landowners, and cultural resources from ORV use which would occur if the proposed new trail was built. (SOR at 2–4.) However, they have failed to offer any evidence that would demonstrate that any material impact is likely to result. We are unable to find that B.A.R. et al. have shown any reasonably foreseeable consequences of the proposed action which BLM should have considered.

will be material ORV use within the entire L-shaped tract, rather than just the north-south leg, along which the proposed trail would be constructed and in the vicinity of the terminus of the trail, particularly when B.A.R. et al. present no evidence contrary to BLM's assertion that the rugged nature of the terrain in the east-west leg of the L-shaped tract is sufficient to deter ORV use. 16/

Bales Ranch contends that BLM's decision to proceed with construction of the proposed new trail, absent adequate consideration of environmental impacts, mitigation measures, and reasonable alternatives, violates the State Director Guidance (Ex. A attached to SOR). (SOR at 5, 13–15 (citing State Director Guidance (Ex. A attached to SOR) at "1," "3," "6").) We have found that BLM has abided by section 102(2)(C) and (E) of NEPA, and are not persuaded that it has deviated from the prescriptions of the State Director Guidance, which essentially mirror NEPA by requiring consideration of the impact on natural resources of permitting access across public lands, ways to mitigate adverse impacts by limiting or regulating access, and reasonable alternatives. See BLM Answer at 7. We find nothing in BLM's findings or the proposed action to be inconsistent with the State Director Guidance. Nor have we been shown anything which would preclude BLM from taking the proposed action.

Bales Ranch has requested a hearing, to allow it an opportunity to present evidence. This Board has discretionary authority, under 43 C.F.R. § 4.415, to order a hearing. However, we find no material "issue of fact," which cannot be resolved on the present record, without an evidentiary hearing. See Felix F. Vigil, 129 IBLA 345, 347 (1994); Woods Petroleum Co., 86 IBLA 46, 55 (1985). Bales Ranch's request for a hearing is denied.

Without further belaboring this decision with additional references to contentions of appellants regarding errors and omissions in the preparation of the EA, and other errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial. 17/ National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

16/ B.A.R. et al. also state that BLM should consider placing a parking lot at the trail terminus in sec. 31, limiting travel beyond that point to foot and horseback traffic, and installing and maintaining signs delineating private land boundaries around the entire L-shaped block. (SOR at 5.) Finding no basis to conclude that these measures are necessary to eliminate or minimize any likely adverse impacts, we find no basis for requiring BLM to consider these measures in its EA.

17/ Having reached a decision on the merits of the appeal, the joint petition to stay the effect of the Assistant Field Manager's August 1998 DR/FONSI, pending our final resolution of their appeals, has been rendered moot.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Assistant Field Manager's August 14, 1998, DR/FONSI is affirmed.

R.W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge